MOTION FEE PAID

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STATE OF SOUTH CAROLINA

COUNTY OF ANDERSON

IN THE COURT OF COMMON PLEAS

Anderson County,

Plaintiff,

vs.

Joey Preston and the South Carolina Retirement System,

Defendants.

C.A. No. 09-CP-04-4482

ANDERSON COUNTY'S MOTION TO ALTER OR AMEND JUDGMENT

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Pursuant to Rules 52 and 59 of the South Carolina Rules of Civil Procedure, Plaintiff Anderson County moves to alter or amend the final order in this case, issued on May 3, 2013, on the following bases.

I. Introduction.

This Court's May 3, 2013 Final Order and Judgment in this case (the "Order") recognizes that Joey Preston's Severance Package was approved by a vote that included Council members who never should have voted or participated in debate, that Preston was aware of those improper votes, and that the Severance Package paid Preston more than he was entitled to receive as severance under his Employment Agreement even if Anderson County breached that agreement and terminated him. Despite these clear and material improprieties, the Order concludes that Anderson County has no recourse – and that it breached an agreement with Preston by attempting to vindicate important public principles.

Anderson County believes the Order fails to address certain matters raised to the Court in the course of trial and related briefing. The Order also provides relief that was not pled, and contains internal inconsistencies and a manifest error. Those matters are enumerated herein. Each of them calls for alteration or amendment of the Order, pursuant to Rules 52(b) and 59(e) of the South Carolina Rules of Civil Procedure.[1]

"The purpose of Rule 59(e), SCRCP, to alter or amend the judgment is to request the trial judge to 'reconsider matters properly encompassed in a decision on the merits.' " *Arnold v. South Carolina*, 309 S.C. 157, 172, 420 S.E.2d 834, 842 (1992) (quoting *Budinich v. Becton Dickinson and Co.*, 486 U.S. 196, 200, (1988)). It substantially reflects Federal Rule of Civil Procedure 59(e). Generally, a motion to alter or amend a judgment is available to address a clear error of

[1] Footnote 2 of the Order can be understood to "incorporate by reference" into the Order any issues raised in the litigation but not expressly addressed in the Order. Anderson County is nevertheless filing this motion, to ensure preservation of the issues mentioned herein.

law or a manifest injustice. *See* 11 WRIGHT, MILLER & KANE, FEDERAL PRACTICE AND PROCEDURE §2810.1. (3d ed. 2012); *see also Robinson v. Wix Filtration Corp.*, 599 F.3d 403, 407 (4th Cir. 2010) (discussing the application of Fed. R. Civ. P. 59(e)). Here, Anderson County submits there has been a clear error of law and that a manifest injustice will result from a failure to alter or amend the final order in this case.

II. Argument

1. The Order fails to distinguish between Council members and persons who will take office in the future, and between actions of the County and actions of individuals. The Order attributes to the County every action of every member of County Council, including actions taken by some future Council members before they took office. Independent actions of individual Council members, and especially actions of persons not in office, are not attributable to the County. *See, e.g.,* Order pp. 4, 32-34. Accordingly, among other things the finding of "unclean hands" by the County is not supported.

Moreover, it was arbitrary and capricious and a violation of public policy for the outgoing County Council to base a decision to pay severance to Preston on the basis of actions – or predicted actions – of persons not on County Council or able to command a majority vote of Council. *See* Order p. 21. These matters are addressed among other places in Anderson County's Post-Trial Memorandum ("Anderson Post-Trial") pp. 19-20, 22-26, which arguments are incorporated by reference.

2. The Order's invalidation of four total votes means there was no quorum for the vote on Preston's Severance Package, rendering the vote void. All seven members of the Anderson County Council were present for the vote on Preston's Severance Agreement. The Order finds that four of the seven votes were improper, and should have been disqualified for interest. The Order then finds the remaining three members of Council cast each of the series of votes required

for passage of the Severance Package and related funding. The Order thus upholds the Severance Agreement on the strength of a series of 3-0 votes. Order pp. 16-18.[2]

The Court should reconsider its upholding of the Severance Agreement on the basis of a 3-0 vote, because that conclusion renders the Order internally inconsistent, it awards relief that was not sought in the pleadings and so could not have been addressed earlier, it is manifest error as a matter of law, and it ignores Anderson County's argument that disqualification of Council members on the basis of the general release contained in the Severance Agreement would lead to the conclusion the Severance Package was not validly passed.

The Anderson County Code requires that four members be present to constitute a quorum. Anderson County Code § 2-37(d).[3] Moreover, South Carolina law is clear that a member of the body who cannot participate because of a conflict of interest ***is not counted toward the quorum***. *Fidelity Fire Ins. Co. v. Harby*, 156 S.C. 238, 153 S.E. 141 (1930), is on point here. In *Harby*, the South Carolina Supreme Court voided an action of the Sumter Cemetery Association, a state-created entity, upon determining that the authorizing vote of the committee was taken without the necessary quorum because committeemen later determined to be disqualified could not be counted towards the quorum. The court held: "A quorum is not

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[2] At page 18, the Order finds the second vote on the Severance Agreement (after removal of votes held improper) to have been 3-0-1. However, because Mr. Waldrep was, according to the Order, disqualified from voting, his abstention should not have been counted; according to the Order, only three persons were eligible to vote.

[3] The provision provides in full:

> *Quorums.* A quorum shall consist of a majority of the council. In the absence of a quorum, the meeting cannot be convened. Should sufficient members leave during a meeting, the chairperson shall immediately declare a recess and attempt to obtain a quorum. If, after a reasonable time, a quorum has not been obtained, the meeting shall be adjourned. Members of county council may excuse themselves briefly during a meeting without loss of a quorum; however, no vote may be taken during the temporary absence of quorum.

present in passing upon a matter in which one of the directors is personally interested, where only a bare quorum is present when he is counted. And likewise an interested director or committeeman cannot be counted in order to make up a quorum to pass upon any matter in which such director or committeeman is interested." *See also Talbot v. James,* 259 S.C. 73, 82, 190 S.E.2d 759, 764 (1972) (corporate director disqualified for interest may not even be counted to make a quorum at a meeting where the matter is acted upon"); *Garris v. Governing Bd. of South Carolina Reinsurance Facility,* 333 S.C. 432, 453, 511 S.E.2d 48, 59 (1998) ("member who recuses himself or is disqualified to participate in a matter due to a conflict of interest, bias, or other good cause may not be counted for purposes of a quorum at the meeting where the board acts upon the matter").

If, as the Order holds, four members of Council had disqualifying interests, there was no quorum present and the matter could not have been acted upon. This means that the Order is internally inconsistent in that it disqualifies four votes, making the vote on the Severance Agreement illegal, yet upholds the Severance Agreement. The Order cannot find four votes were bad without also invalidating the Severance Agreement itself.

The prospect of destruction of a quorum was not present in this case until the Order invalidated four votes. As the Order notes, Anderson County argued for the invalidation of only three votes, and Preston's pleadings cannot reasonably be construed to have sought invalidation of ***any*** votes; Preston denied the allegations that improper votes were cast, and never amended his pleadings to seek the remedy of disqualification.[4] Accordingly, the conclusion in the Order that four votes should not have been cast constitutes new matter in this case, an internal

[4] The Order also fails to address Anderson County's argument that the remedy of disqualification of Cindy Wilson and Bob Waldrep was never sought in any pleading. Anderson Post-Trial pp. 16-17.

inconsistency, and relief that was not sought in the pleadings. In addition, the conclusion that a matter could be validly enacted by a 3-0 vote is a clear error of law. This ruling is appropriately addressed in this motion. *See* J. TOAL, S. VAFAI & R. MUCKENFUSS, APPELLATE PROCEDURE IN SOUTH CAROLINA at 60 (2d ed. 2002) (post-trial motion is appropriate vehicle to address relief not requested or inconsistencies in final order). Where the court has issued a ruling on a matter not appropriately before it and to which the parties had not been given an adequate opportunity to address, any error in the ruling may be corrected on a Rule 59(e) motion. *See Moreau v. Allied Van Lines, Inc.*, Civil Action No. 1:07–3257–RBH, 2010 WL 2044663 (D.S.C. May 20, 2010) (vacating the court's *sua sponte* granting of summary judgment in favor of the plaintiff, where the only motion pending before the court concerned the defendant's request for summary judgment).

Moreover, the County did point out the consequence of considering and accepting Preston's passing argument that the general release contained in the Severance Package constituted a disqualifying benefit. In argument and in Anderson County's post-trial memorandum, the County pointed out that – if the Court considered and accepted the unpled argument that Cindy Wilson and Bob Waldrep should have been disqualified for interest – the result would be that the matter should be deemed to fail for a lack of votes. Anderson Post-Trial p. 17 (arguing in the context of disqualification of all votes on the basis of the release language relied on by the Order to disqualify Waldrep and Cindy Wilson only).

If the Court holds to its ruling that four votes never should have been cast for the Severance Package and related matters, then the entire vote was illegal and should be invalidated.

3. The Order does not address Anderson County's showing that Bill McAbee was associated with Amy Plummer and benefited from payment for her travel, and real estate commissions directed to her by Preston. While the Order addresses McAbee's own travel and commissions, it does not address the County's showing of a business connection between McAbee and Amy Plummer, and of the travel and commission benefits she received that operated to disqualify him. *Compare* Order pp. 7-8 *and* Anderson Post-Trial pp. 15-16.

4. The Order does not address the fact that Preston was aware – at the very moment they were voting for his Severance Package – that Thompson and Ron Wilson should have been disqualified. In finding that Thompson and Ron Wilson should not have voted because of financial benefits obtained or sought from Preston, the Court did not point out that Preston inescapably knew of those benefits, and that he was present when Thompson and Ron Wilson cast their tainted votes. Preston admitted his knowledge and his presence at the hearing.

Among other reasons, these facts are significant to the County's third through sixth causes of action. The Order misapprehends Preston's duty and the County's argument in this regard. The fact that Preston was adverse to the County ***as a claimant*** did not mean that he had no duties ***as County Administrator***. The impropriety of the Thompson and Ron Wilson votes had nothing to do with Preston's adversity to the County; they had to do with the conduct of County business and as such Preston retained a duty to speak and point out those improprieties. His failure to do so was a breach of fiduciary duty, fraud, constructive fraud, and negligent misrepresentation. Anderson Post-Trial p. 34.

5. The Order is inconsistent in finding there was no evidence that Ron Wilson knew of his own daughter's contract with the County at the time of the vote (Order p.9), while holding Preston had no duty to disclose that contract to County Council because it was "public

information" and "widely known (Order pp. 26-27)." It was also reasonable to infer from the testimony that Ron Wilson knew of his daughter's contract; they two were close and he had expressed an interest in the contract.

6. The Order fails to address the available inference of knowing impropriety and bias from the fact that Preston invested the proceeds of his severance package in the silver investment business (later admitted to be a Ponzi scheme) operated by Ron Wilson.

7. The Order fails to identify and address each of the factors that the County argued distinguish this case from *Baird v. Charleston County*. The County identified numerous factors that distinguish this case from *Baird*, and that justify application of the rule that a single bad vote is enough. The Order did not address all of those factors. They are: the vote to pay Preston $1.1 million was a ***special benefit to one individual***, rather than a law of general application; the Severance Package passed by a ***simple motion – not in the form of an ordinance*** that would require public notice and three readings; ***bad votes were cast by leaders of the body*** – both the Chair of County Council and the Chair of the Personnel Committee never should have been involved or participated in any way, and their influence pervaded the proceeding; the ***matter was not announced in advance or extensively debated***, or the procedure surrounding enactment was otherwise suspect (this argument includes the visibly implausible and undemocratic nature in which the Severance Package was added to the agenda, voted on, and procedurally insulated by spurious "motions to reconsider," all of which was clear in the videotape of the proceeding and admitted by, among others, Bill McAbee); existing ***conflicts of interest were kept hidden*** by the interested party; the outcome was ***not subject to the normal process of political redress***. As is set forth in more detail in Anderson County's post-trial memorandum, all of these factors are

clearly present here and call for the conclusion that the participation and votes of Thompson and Ron Wilson require invalidation. Anderson Post-Trial pp. 3-7.

The Order also does not give proper weight to the proposition that improper participation in debate by key members of the body – such as the chair of County Council and the chair of the Personnel Committee – can make even a single tainted vote improper. Even where the party did not cast a vote, it has been recognized that such participation can and should nullify the outcome of a tainted proceeding. *See Gilbert v. McLeod Infirmary*, 64 S.E.2d 524, 219 S.C. 174 (S.C. 1951) (invalidating vote where director "did not vote in the corporate meetings upon the question, but he seems to have done about everything else which was calculated to accomplish his end"). This makes sense; members of bodies like County Councils often look to and rely on those who have been most deeply involved in a particular matter for a lead on how to vote.

8. The Order does not address Anderson County's argument that the Severance Package was arbitrary and capricious, and violated public policy, because it was based on an asserted claim for "anticipatory breach" that could not exist as a matter of law. Anderson County's Second and Seventh Causes of Action allege the Severance Package was arbitrary and capricious and violated public policy. The public policy violation consists not just of the improper consideration of and vote for the Severance Package, but also includes the Severance Package's arbitrary terms and circumstances. Preston's lawyer wrote a demand letter claiming only "anticipatory breach" of Preston's Employment Agreement. While that letter alluded to unspecified other claims, there was no evidence any such other claim was ever identified or could be valid, especially given that Preston already had an active lawsuit making extensive claims concerning interference with his job.

Anderson County demonstrated that Preston's anticipatory breach claim was legally impossible. His Employment Agreement allowed him to be terminated at any time. Moreover, his claim was based on a prediction of what the incoming Council might do. Those events had not occurred. There was thus no event that could constitute anticipatory breach. *Collins Holding Corp. v. Wausau Underwriters Ins. Co.*, 204 Fed. Appx. 208 (4th Cir. 2006) (anticipatory breach must be "unequivocal," "unconditional," and a "final and absolute declaration that the contract must be regarded as altogether off"; applying S.C. law).

It was arbitrary and capricious, and a violation of public policy, to pay Preston over $1 million to settle a claim with no legal validity whatsoever, when his Employment Agreement provided only for a much smaller severance. Anderson Post-Trial pp. 18-21.

9. The Order Misapprehends the Third Cause of Action, for Breach of Fiduciary Duty. The County's argument for breach of fiduciary duty is that Preston, as the highest ranking non-elected officer of Anderson County, owed the County the highest duty of loyalty. When he knowingly allowed Thompson and Ron Wilson to introduce, debate, preside over, and cast improper votes concerning his Severance Package, he breached that duty. Because the vote was for his benefit, the proper remedy was rescission. Here again, the special influence of the Chair points out why two bad votes, cast by key participants, matter. The Order does not address this argument.

10. The Order misapprehends the duty Preston owed the County. At page 25, the Order holds that Preston "did not possess a duty to disclose information about his employment claims to County Council." This conclusion does not address the duty that Anderson County believes Preston did have. Preston remained employed by the County. He was present at the Council meeting when his Severance Package was approved, and he knew at that time of the

disqualifying facts concerning the Thompson and Ron Wilson votes. The County contends that, as County Administrator present at a vote affecting his own interest, Preston had a duty to make those conflicts known. This was not "information about his employment claims." It was part of his job and his duty of loyalty as County Administrator. The Order does not address this duty.

11. The Order does not address the County's argument that Preston continued to act with respect to the Heather Jones memoranda after he had left office. The problem with Preston's forgery of the Heather Jones memoranda was not merely that he back-dated them falsely – for the obvious purpose of deceiving his employer. He also acted after he was no longer in office, which was a clear and fundamental breach of the Severance Agreement that terminated his employment. Anderson Post-Trial pp. 34-36.

12. The Order does not address the County's argument that funds owed Preston by the Retirement System can appropriately be considered in fashioning a remedy. Preston is currently receiving more than $7,600 per month in retirement benefits paid by SCRS – retirement benefits to which Preston would not be entitled but for the County's purchase of retirement service credit on his behalf. This includes a stream of income from January 1, 2010 until Preston turns 60 (worth close to $1 million) to which Preston would never have been entitled but for the inclusion, in the Severance Agreement, of a purchase of retirement years on Preston's behalf. These funds are available to create an equitable remedy. S.C. Code § 9-1-1680 contains an express exception for precisely this type of case. It provides in relevant part, "***[S]ubject to the doctrine of constructive trust ex maleficio*** . . ., the right of a person to an annuity or a retirement allowance . . . are exempted from . . . levy and sale, garnishment, attachment, or any other process . . . ." (Emphasis added.) Thus, the statute allows a constructive trust on retirement fund

proceeds in the face of wrongdoing. The statute and equitable principles allow the Court to fashion a remedy that includes the redirection of some or all of these funds to the County.

13. The Order does not address Anderson County's demonstration that rescission is available and appropriate. The Order holds it is impossible to return the parties to the precise *status quo ante*. Anderson County argued a rigid insistence on a return to the literal *status quo* is not required. First, the "changed circumstances" defense to rescission is not available where the one invoking the defense is at fault. Mr. Preston's own culpability prevents him from relying on the fact the County did not hold his post open since 2009 to avoid any remedy. *See* 17B C.J.S. Contracts § 652 ("Complete restoration is not necessary if the party that is not fully restored was actually at fault"). Second, equity is not so limited in fashioning remedies. Equity is flexible enough to allow rescission in a situation like this, even where a former position has been filled. *See Griggs v. E.I. DuPont de Nemours & Co.*, 385 F.3d 440, 452 (4th Cir. 2004) (Traxler, J.; Wilkins, C.J. concurring in relevant part) ("in the event restoration to the status quo is impossible, rescission may be granted if the court can balance the equities and fashion an appropriate remedy that would do equity to both parties and afford complete relief"). Third, Preston ignores the public aspects of this case, and the fact that rescission is the remedy that must be invoked when a governmental action like this one is determined to be improper; the considerations here are different from those that might apply in a purely private contractual setting. When, as here, a governmental body acts on the basis of tainted votes, and in an arbitrary and unreasonable manner, it is imperative that an appropriate remedy be fashioned. The public interest in avoiding such improper acts must be given substantial weight in such a circumstance.

14. The Order misstates the law in finding that a declaratory judgment action provides an "adequate remedy at law." Anderson County seeks to rescind the Severance Agreement and to obtain relief from Preston; a declaratory judgment action would not provide the same remedies as rescission.

15. The Order fails to note that Anderson County Council voted to dismiss the action Preston commenced against Cindy Wilson and Bob Waldrep. Although the Court takes judicial notice of the entire record in that case, Order n.3, it does not note that Anderson County dismissed the case. This effectively ended the TRO entered by Judge Nicholson. Moreover, the fact that County Council could direct dismissal of the action emphasizes that this lawsuit was not brought by Preston in his private capacity, but in his role as County Administrator. When Preston left office, the new County Administrator became the Plaintiff. This further undermines the Court's conclusion that Cindy Wilson and Bob Waldrep had any special interest in the Severance Package vote. Preston's personal release in the Severance Agreement had nothing to do with his official capacity suit naming them; and in fact that release was not the basis for ending that lawsuit.

The Order also fails to note that the Preston lawsuit was premised on actions that took place years before, and that the injunction awarded in that case gave Preston a remedy that undermines his claims in negotiating for a Severance Agreement of certain other "unspecified torts." In fact, Preston had already litigated over those matters. Anderson Post-Trial pp. 24-26.

III. Conclusion

The Order holds that a County Administrator may knowingly sit silently while County Council members who should be disqualified – including one actively seeking employment from the County Administrator – vote on a rich severance package for him. It further holds that in that egregious circumstance, equity is powerless to fashion any remedy at all.

Anderson County believes the Order is in error that such conduct is acceptable, and that it is without remedy. Anderson County submits that the Order should be reconsidered for all of the reasons argued and briefed by Anderson County. Those prior arguments are incorporated herein by reference, but not reiterated, as the Court is familiar with them. For those reasons and for the reasons set forth herein, Anderson County requests that the Order be altered or amended to rescind the Severance Package and provide Anderson County appropriate relief.

Respectfully submitted,

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